

O/550/20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003405839

BY MI-FAN LIMITED

TO REGISTER THE FOLLOWING TRADE MARK:

M i • F a n

IN CLASS 11

AND IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 417795

BY XIAOMI SINGAPORE PTE. LTD

BACKGROUND AND PLEADINGS

1. On 11 June 2019, Mi-Fan Limited (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 21 June 2019 and registration is sought for the following goods:

Class 11 Portable electric fans.

2. On 23 September 2019, Xiaomi Singapore Pte. Ltd (“the opponent”) opposed the application based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). For the purposes of its opposition based upon sections 5(2)(b) and 5(3), the opponent relies upon the following trade marks:



IR designating the UK no. 1331842

International registration date: 14 April 2016

Date of designation: 14 April 2016

Date of protection granted in UK: 20 July 2017

(“the First Earlier Mark”)

MIHOME

IR designating the UK no. 1340015

International registration date: 14 November 2016

Date of designation: 14 November 2016

Date of protection granted in UK: 11 April 2018

(“the Second Earlier Mark”)

3. Under section 5(2)(b), the opponent relies upon the goods in class 11 for which the earlier marks are registered only (as set out in the Annex to this decision) and claims

that there is a likelihood of confusion because the marks are similar and the goods are identical or similar.

4. Under section 5(3), the opponent claims a reputation in respect of the goods in class 11 for which the earlier marks are registered. The opponent claims that use of the applicant's mark would, without due cause, take unfair advantage of, or be detrimental to, the distinctive character and/or reputation of the earlier marks.

5. For the purposes of its opposition based upon section 5(4)(a), the opponent claims to have used the sign **MI** throughout the UK since 2011 in relation to "electric fans; room fans; air-conditioning fans; ventilating fans; axial fans; computers; computer software; mobile phones; computer programming; computer software design; computer system design; industrial design."

6. The applicant filed a counterstatement denying the claims made.

7. Both parties filed evidence in chief. The opponent filed evidence in reply. A hearing took place before me on **22 October 2020**, by video conference. The opponent was represented by Mr Philip Harris of Lane IP Limited. Mr Harris filed a skeleton argument in advance of the hearing. The applicant has been represented throughout these proceedings by Azrights International Limited, but elected not to attend the hearing and did not file written submissions in lieu.

EVIDENCE AND SUBMISSIONS

8. The opponent filed evidence in the form of the witness statement of Seah Geok Suan dated 20 January 2020, which is accompanied by 22 exhibits. Mr Suan is the Secretary of the opponent.

9. The applicant filed evidence in the form of the witness statement of Sheree Gordon dated 8 April 2020, which is accompanied by 1 exhibit. Ms Gordon is the CEO and co-founder of the applicant.

10. The opponent filed evidence in reply in the form of the witness statement of Matthew McAleer dated 10 August 2020, which is accompanied by 5 exhibits. Mr McAleer is one of the attorneys representing the opponent in these proceedings.

11. I have taken all of this evidence into consideration in reaching my decision. Whilst I do not propose to summarise it here, I will refer to it below where necessary.

DECISION

My Approach

12. At the hearing, Mr Harris confirmed that the opponent's best case was the section 5(2)(b) ground of opposition. Consequently, I will begin by considering the section 5(2)(b) ground, returning to the section 5(3) and 5(4)(a) grounds only if it is necessary to do so.

Section 5(2)(b)

13. Section 5(2)(b) of the Act reads as follows:

“5(2) A trade mark shall not be registered if because –

(a) [...]

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

14. The trade marks upon which the opponent relies qualify as earlier trade marks because they were applied for at an earlier date than the applicant's mark pursuant to section 6 of the Act. As the opponent's marks had not completed their registration

process more than 5 years before the filing date of the application in issue, they are not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods it has identified.

15. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of trade marks

16. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (“CJEU”) stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“... it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means

of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

17. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

18. The respective trade marks are as follows:

Opponent's trade marks	Applicant's trade mark
 <p>(the First Earlier Mark)</p>  <p>(the Second Earlier Mark)</p>	<p>M i • F a n</p>

19. The First Earlier Mark consists of a graphical device consisting of four vertical lines, the second of which is shorter than the other three, and one horizontal (slightly curved) line, which joins the first and third vertical lines at the top. There are no other elements to contribute to the overall impression of the mark which lies in the device itself. The Second Earlier Mark consists of the word MIHOME. There are no other elements to contribute to the overall impression of the mark, which lies in the word itself. The applicant's mark consists of the words MI and FAN separated by a dot device. The eye is naturally drawn to the elements of the mark which can be read and so it is the

words that play the greater role in the overall impression of the mark, with the dot device playing a lesser role.

Visual Comparison

The First Earlier Mark and the Applicant's Mark

20. At the hearing, Mr Harris submitted that the First Earlier Mark is clearly the invented word MI in a stylised font. In this regard, Mr Harris referred me to a decision of the EUIPO in which it was found that the First Earlier Mark is “a figurative mark consisting of two letters, ‘MI’, the letter ‘M’ being in a stylised font”.¹ Decisions of the EUIPO are, of course, not binding on this Tribunal. In my view, the applicant’s submission is correct i.e. that this is simply a graphical device. It may be the case that some people will identify this as the word MI, but I do not consider that a significant proportion of average consumers will do so. Nevertheless, I recognise that there may still be a degree of visual similarity between the device and the word “MI” in the applicant’s mark to the extent that the device is similar in shape to the letters MI, but that in my view is where the similarity ends. Any visual similarity that does exist, in my view, will only be a low degree.

The Second Earlier Mark and the Applicant's Mark

21. Both marks clearly contain the word MI in the same position (i.e. at the start). As notional and fair use of a word mark covers use in any standard typeface, I do not consider that the use in upper and title case makes any material difference. The marks differ in the presence of the word HOME in the Second Earlier Mark and the word FAN in the applicant’s mark. As the applicant submits, the dot device in the applicant’s mark is also a point of visual difference. I consider the marks to be visually similar to between a low and medium degree.

Aural Comparison

¹ Opposition No. B 2 618 430

The First Earlier Mark and the Applicant's Mark

22. In *Dosenbach-Ochsner AG Schuhe und Sport v OHIM*, Case T-424/10 the General Court stated:

“45. ...contrary to what the applicant submits, a phonetic comparison is not relevant in the examination of the similarity of a figurative mark without word elements with another mark (see, to that effect, Joined Cases T-5/08 to T-7/08 *Nestle v OHIM – Master Beverage Industries (Golden Eagle and Gold Eagle Deluxe)* [2010] ECR II-1177, paragraph 67).

46. A figurative mark without word elements cannot, by definition, be pronounced. At the very most, its visual or conceptual content can be described orally. Such a description, however, necessarily coincides with either the visual perception or the conceptual perception of the mark in question. Consequently, it is not necessary to examine separately the phonetic perception of a figurative mark lacking word elements and to compare it with the phonetic perception of other marks”.

23. In its counterstatement, the applicant submits: “The Opponent’s First Sign would not be spoken but is simply a geometrical design having only a visual aspect to it. The signs therefore have no aural similarity”. As I have found the First Earlier Mark to be a device mark (rather than the opponent’s suggestion that it will be viewed as the invented word MI), I agree with the applicant and do not consider that the average consumer will attempt to articulate it. As such, an aural comparison would not be appropriate.

The Second Earlier Mark and the Applicant's Mark

24. I do not consider that the dot device in the applicant’s mark will be pronounced. I consider that the applicant’s mark will be pronounced MY-FAN. The Second Earlier Mark will be pronounced MY-HOME. The first syllable of both marks will, therefore, be pronounced identically. I note the opponent’s submission that the word “MI” will be pronounced in the same way as the ordinary dictionary word “ME”. At the hearing, Mr

Harris noted that the spelling of the word “MI” is more in line with what you would be likely to see in a Spanish or Latin language and, therefore, is likely to be pronounced accordingly. I consider this unlikely given the way in which the letter “I” is typically pronounced by the English speaking consumer. However, even if I am wrong in this finding, the same pronunciation will be attributed to both marks. The aural difference lies in the pronunciation of the different second word. I consider the marks to be aurally similar to a medium degree.

Conceptual Comparison

The First Earlier Mark and the Applicant’s Mark

25. As noted above, Mr Harris submitted that the First Earlier Mark will be viewed by the average consumer as a stylised version of the invented word MI. As explained above, I disagree and consider that the mark will be seen as a graphical device. Consequently, I do not consider that it conveys any meaning. The applicant’s mark will be identified as an invented word or deliberate misspelling of the dictionary word MY combined with the word FAN, which has no counterpart in the First Earlier Mark. I consider the First Earlier Mark and the applicant’s mark to be conceptually dissimilar.

The Second Earlier Mark and the Applicant’s Mark

26. The marks will coincide to the extent that they both contain the same invented word or misspelling of the ordinary dictionary word MY i.e. MI. If any meaning is attributed to this then it will be identical for both marks. The words FAN and HOME will be given their ordinary dictionary meaning. Although these words are conjoined in the Second Earlier Mark, I do not consider that this will prevent the average consumer from identifying the separate word elements. I consider the marks to be conceptually similar to a medium degree if the invented word MI is identified as a misspelling of the word MY. If the word MI is perceived as an invented word it will convey no meaning and will be conceptually neutral. The marks will differ conceptually to the extent that they refer to the words FAN and HOME.

27. As I have found the Second Earlier Mark to share the greater degree of similarity with the applicant's mark, I will proceed with my assessment on the basis of that mark as it represents the opponent's best case.

Comparison of goods

28. The goods upon which the opponent relies in class 11 cover a fairly broad range of goods. I have, therefore, included only those goods covered by the Second Earlier Mark which are listed in Mr Harris' skeleton argument as follows:

Opponent's goods	Applicant's goods
<p>Second Earlier Mark <u>Class 11</u> Ventilating fans; axial fans.</p>	<p><u>Class 11</u> Portable electric fans.</p>

29. In the *Treat* case, [1996] R.P.C. 281, Jacob J. (as he then was) identified the following factors for assessing similarity:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

30. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“GC”) stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut for Lernsysteme v OHIM – Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

31. In its counterstatement, the applicant submits as follows:

“The goods of the Applicant’s Application are portable electric fans. Those of the Opponent’s Application for the First Sign including air conditioning fans, electric cooling fans and electric fans and those of the Application for the Second Sign include air conditioning fans, ventilating fans and axial fans. Portable electric fans are a particular type of fans, typically small enough to be portable and acquired from general, rather than specialist retailers. The Opponent’s goods are likely to be more substantial items supplied by specialist ventilation companies. The goods of the Applicant and the Opponents therefore have only a moderate similarity.”

32. In her witness statement, Ms Gordon states as follows, by way of submission:

“4) The Applicant and its trade marks are known in the ventilation industry in connection with portable fans and it is the Applicant’s intention to continue trading only in that category. By contrast, [the Opponent], has a range of different products and is best known for phones and scooters.

5) The price of the Applicant's and the products [sic] is no more than £100 whereas that of the Opponent can be as high as £400 or more. Accordingly, the respective brands of the Applicant and the Opponent have very different financial demographics, resulting in a low risk of confusion. In addition, whereas, in spite of the closure of the Opponent's store in Westfield Shepherd's Bush, the Opponent sells its products both in-store and online, the Applicant only sells online, thereby reducing the risk of any confusion.

6) The products of the Applicant tend to attract a young demographic as is shown by their ability to acquire features in *Cosmopolitan*, *ELLE* and *Harper's Bazaar* magazines for which the readership is predominantly younger people. In addition, the Applicant's products are purchased by travellers which has led to features in the travel section in *Tatler* and *House & Garden* magazines. The press of the products of the Opponent tends to comprise very tech based articles, again illustrating the different demographics and the low risk of cross over."

33. The opponent has responded to these submissions in its evidence in reply.

34. For the avoidance of doubt, it is the goods for which the marks are applied-for/registered that are relevant to my assessment. The way in which the marks are used in practice (and in relation to which goods) is irrelevant. I must consider all the ways in which the marks could be used by reference to the full breadth of their specifications.

35. The term "axial fans" in the opponent's specification refers to a fan that rotates on an axis, thereby changing the direction of airflow.² The term "ventilating fans" is a general term used to describe fans used for ventilation. At the hearing, Mr Harris submitted that these terms should be considered identical to the applicant's goods on the principle outlined in *Merix*. I agree. The applicant's specification covers portable electric fans which could fall within each of the terms in the opponent's specifications,

² <https://www.collinsdictionary.com/dictionary/english/axial>

all of which could be electrically powered. I consider these goods to be identical. If I am wrong in this finding, then the goods will overlap in nature, user, purpose, method of use and trade channels and will be highly similar.

The average consumer and the nature of the purchasing act

36. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

37. I consider the average consumer for these goods to be members of the general public or business users. The cost of the purchase is likely to be relatively low, although purchases are unlikely to be particularly frequent. Various factors will be taken into consideration during the purchasing process, such as size, strength and suitability for the user's particular purpose. Taking all of this into account, I consider that a medium degree of attention is likely to be paid during the purchasing process for the goods.

38. I consider that the goods are likely to be purchased by self-selection from the shelves of a retail outlet or their online or catalogue equivalents. Consequently, visual considerations will dominate the purchasing process. I do not discount that there may also be an aural component to the purchase, given that advice may be sought from sales assistants.

Distinctive character of the earlier mark

39. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

40. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high distinctive character, such as invented words which have no allusive qualities.

41. The relevant market for assessing enhanced distinctive character is the UK market. There are clearly issues with the opponent's evidence in this regard. Much of the opponent's evidence relates to use outside of the UK and to goods that are not covered by its specification. A great deal of the opponent's evidence is also undated. There is evidence that the opponent's goods are stocked in national retailers in the UK, but this is undated and does not identify to which goods this use relates.³ The evidence that does show which goods are sold through national retailers does not relate to the relevant goods.⁴ There is evidence that the opponent has a UK-based website, but this is undated save for the print date of 3 January 2020.⁵ In any event, it does not appear to include use of the marks relied upon in relation to the relevant goods. There is evidence that the "MI HOME app" is used for communication with various smart devices and that this has been available in the UK since 27 January 2015.⁶ However, this is use in relation to applications for mobile phones, not portable electric fans. I note that the opponent has won a number of international awards, but it is not clear how these relate to the UK market and there is no evidence that these relate to the goods in issue.⁷

42. There are some examples of the opponent being referenced in the UK press.⁸ However, no mention is made of the Second Earlier Mark. Reference is made to "MI" but, as I have explained above, I do not consider that this word will be identified in the First Earlier Mark. In any event, none of these publications appear to refer to the goods relied upon for the purposes of the opponent's 5(2)(b) opposition. Information is given about the opponent's social media presence, but the figures provided relate to global followers and no breakdown is given for followers in the UK.⁹ The opponent's first store was opened in London on 18 November 2018.¹⁰ However, no information is provided about how many of the relevant goods have been sold through that store. In any event, I do not consider one store in London that had been operating for only around 7 months at the relevant date to be sufficiently geographically widespread or long-standing to

³ Exhibit SS5

⁴ Exhibit SS7

⁵ Exhibit SS6

⁶ Witness statement of Seah Geok Suan, para 19

⁷ Witness statement of Seah Geok Suan, para 22 and 23

⁸ Exhibit SS17

⁹ Exhibit SS18

¹⁰ Witness statement of Seah Geok Suan, para 14

establish enhanced distinctiveness. Global turnover figures have been provided but these are not broken down by region or goods. No information is provided about the opponent's market share for the UK market in relation to the relevant goods. No information is provided about advertising expenditure in relation to the UK market. Taking all of this into account, I do not consider the evidence to be sufficient to establish enhanced distinctiveness.

43. The Second Earlier Mark consists of the conjoined words MI and HOME. The word MI will be seen as an invented word or a misspelling of a common dictionary word MY. The word HOME is likely to be seen as descriptive of the type of goods sold under the marks i.e. fans for home use. I consider the mark to be inherently distinctive to either between a low and medium degree or a medium degree, depending on how the word MI is perceived.

Likelihood of confusion

44. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the Second Earlier Mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

45. In her witness statement, Ms Gordon states by way of submission:

“7) Since the Applicant commenced selling and advertising its products, its brand has become known and yet there has not been a single instance to its

knowledge of any confusion between the products and trade marks of the Applicant and the Opponent nor any indication of an association made by the Applicant's customers between the Applicant and the Opponent.”

46. In *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. stated that:

“80.the likelihood of confusion must be assessed globally taking into account all relevant factors and having regard to the matters set out in *Specsavers* at paragraph [52] and repeated above. If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion. But conversely, the absence of actual confusion despite side by side use may be powerful evidence that they are not sufficiently similar to give rise to a likelihood of confusion. This may not always be so, however. The reason for the absence of confusion may be that the mark has only been used to a limited extent or in relation to only some of the goods or services for which it is registered, or in such a way that there has been no possibility of the one being taken for the other. So there may, in truth, have been limited opportunity for real confusion to occur.”

47. In *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283 Millett L.J. stated that:

"Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark.”

48. It may be that, in practice, the parties are targeting different markets and selling entirely different products. This may very well be the reason that no confusion has occurred to date. However, consumers who are confused may never know that they have been confused and may not, therefore, report it to the party from which they purchased the goods. I do not, therefore, consider the absence of actual confusion to be relevant to the decision I must make.

49. I have found the Second Earlier Mark and the applicant's mark to be visually similar to between a low and medium degree and aurally similar to a medium degree. I have found the conceptual meaning conveyed by the word MI to be neutral if it is perceived as an invented word or identical to the meaning conveyed by the word MI in the applicant's mark if they are perceived as a misspelling of the word MY. However, the marks will differ conceptually to the extent that they refer to the words FAN and HOME respectively. The Second Earlier Mark is inherently distinctive either to between a low and medium degree or a medium degree, depending upon how the word MI will be perceived. I have identified the average consumer to be a member of the general public or a business user who will purchase the goods by predominantly visual means (although I do not discount an aural component). I consider that a medium degree of attention will be paid during the purchasing process. I have found the goods to be identical or highly similar.

50. Taking all of the above factors into account, I consider that the visual and aural differences between the marks are sufficient to avoid them being mistakenly recalled or misremembered as each other, notwithstanding the principle of imperfect recollection. I do not consider that the presence of the words FAN and HOME, as well as the dot device in the applicant's mark, will be overlooked. I do not consider there to be a likelihood of direct confusion.

51. However, as both words share the common invented word/misspelling – MI – I consider it likely that this will be viewed by the average consumer as indicating goods that are sold by the same or economically linked undertakings. This will particularly be the case given that the marks are going to be used on identical or highly similar goods. I consider that the addition of the descriptive words HOME and FAN will be seen as sub-brands i.e. a range of fan products and a range of products specifically for the home. I consider that the dot device in the applicant's mark will be seen as just an alternative presentation used in that particular mark. Taking all of this into account, I consider there to be a likelihood of indirect confusion.

Section 5(3) and section 5(4)(a)

52. As noted above, Mr Harris accepted that the opponent's opposition under section 5(2)(b) is its best case. As I have found in favour of the opponent on this ground, I do not consider it necessary to go on to assess the section 5(3) and 5(4)(a) grounds as this will not put the opponent in a stronger position.

CONCLUSION

53. The opposition is successful in its entirety and the application is refused.

COSTS

54. At the hearing, Mr Harris submitted that should he be successful costs should be awarded to his client on the normal scale i.e. the scale published in Tribunal Practice Notice 2/2016. In making my award, I bear in mind that the hearing was less than an hour in length. In the circumstances, I award the opponent the sum of **£1,600** as a contribution towards its costs, calculated as follows:

Preparing a Notice of opposition and considering the applicant's counterstatement	£300
Filing evidence, considering the applicant's evidence and filing evidence in reply	£600
Preparing for and attending the hearing	£500
Official fee	£200
Total	£1,600

55. I therefore order Mi-Fan Limited to pay Xiaomi Singapore Pte. Ltd the sum of £1,600. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 5th day of November 2020

S WILSON

For the Registrar

ANNEX

The goods upon which the opponent relies are as follows:

The First Earlier Mark

Class 11 Electric lamps; lighting lamps; lighting apparatus and installations; lighting devices for showcases; lampshades; flashlights; apparatus for the lighting of vehicle; germicidal lamps for air purification; electric cookers; cooking apparatus and installations; kitchen stoves; cooking ovens; electric pressure cookers; electric kettles; water heaters; refrigerators; refrigeration installations; refrigeration units; electric air deodorizing apparatus for refrigerators; air filtering apparatus; air conditioning apparatus; air filtration installations; air dryers; clothes dryers; dryers for the hands using a warm air drying stream; drying apparatus; air conditioning fans; electric cooling fans; ventilation (air-conditioning) installations and apparatus; apparatus for ventilating vehicles; electric fans; electric hair dryers; hot water heaters; electric heating apparatus; installations for heating consisting of halogen heating devices; heaters for heating irons; electric heaters; apparatus for water supply purposes; fireplaces, domestic; tap water faucets; apparatus for heating; temperature control apparatus (valves) for central heating radiators; automatic watering installations; bath installations; bath fittings; sanitary apparatus and installations; toilets [water-closets]; apparatus for disinfection; apparatus for water purification; apparatus for water filtering; machines for the processing (purification) of sewage; water softeners (apparatus); disposable sterilization pouches; portable electric heaters; lighters.

The Second Earlier Mark

Class 11 Electric kettles; air dryers; clothes dryers; dryers for the hands using a warm air drying stream; drying apparatus; heaters for heating irons; electric hair dryers; drying apparatus and installations electric cookers; cooking apparatus and installations; electric pressure cookers; toasters; lighters; freezers; refrigerators; refrigeration installations; refrigeration

units; refrigerator deodorizing units; air purification apparatus; air conditioning apparatus; air filtration installations; air cooling apparatus; air-conditioning fans; water filter apparatus; gas purification apparatus; ionizers for the treatment of air or water; machines for the processing (purification) of sewage; apparatus for water purification; fabric steamers; ventilating fans; axial fans; air humidifier; automatic faucets; water distributing apparatus (automatic); water installations (automatic); automatic flushing installations for urinals; toilet stool units with a washing water squirter; toilets with washing functions; automatic watering installations; bathroom fixtures; bathroom installations; bath fittings.